Supreme Court, U.S.
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No. 951988

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1995

NICK JAMES BOVIS, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Sixth Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner was denied his federal constitutional right under the Sixth Amendment to the United States Constitution to have effective assistance of counsel at trail where the sole and only defense at trial was a lack of specific intent due to a mental disease or mental disorder, and no instruction was given to the jury, or even requested by petitioner's trial counsel, relating the evidence of mental disease or mental disorder to the specific intent element of the charged offense of robbery.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT.	2
A. How the Federal Question was Presented . . .	2
B. The Pertinent Facts .	3
REASONS FOR GRANTING THE PETITION	22
CONCLUSION	30

APPENDIX A - OPINION OF COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

APPENDIX B - ORDER OF COURT OF APPEAL DENYING PETITION FOR REHEARING

APPENDIX C - ORDER OF SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW

TABLE OF AUTHORITIES

FEDERAL CASES CITED

Page

Kimmelman v. Morrison
(1986) 477 U.S. 365
[91 L.Ed.2d 305] 23

Strickland v. Washington
(1984) 466 U.S. 668
[80 L.Ed.2d 674] 23, 27, 29

STATE CASES CITED

People v. Ledesma
(1987) 43 Cal.3d 171 27

People v. Morales
(1992) 5 Cal.App.4th 917 25

People v. Saille
(1991) 54 Cal.3d 1103 25

People v. Sedeno
(1974) 10 Cal.3d 703 27

People v. Whitler
(1985) 171 Cal.App.3d 337 25

CONSTITUTIONS CITED

U.S. Constitution, Sixth Amendment . . 2

FEDERAL STATUTES CITED

28 U.S.C. § 1257(a) 2

STATE STATUTES CITES

California Penal Code, § 211 2

California Penal Code,
§ 12022.5, subd. (a) 2

OTHER CITATIONS

California Jury Instructions -
Criminal (5th ed. 1996 Supp.) . . 25

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SIXTH APPELLATE DISTRICT

Nick James Bovis respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California for the Sixth Appellate District in this case.

OPINION BELOW

The opinion of the Court of Appeal of California, Sixth Appellate District (Appendix A), is unreported.

JURISDICTION

The judgment of the Court of Appeal of California, Sixth Appellate District, was entered on December 13, 1995 (Appendix A). The Court of Appeal denied a timely

petition for rehearing on January 12, 1996 (Appendix B). On March 13, 1996, the Supreme Court of California denied a timely petition for review (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT

A. How the Federal Question was Presented:

In the Superior Court of Santa Clara County, State of California, petitioner was convicted by a jury of second degree robbery with personal use of a firearm (Cal. Pen. Code, §§ 211; 12022.5, subd. (a)), and was sentenced to five years in state prison.

The issue of petitioner receiving ineffective assistance of counsel in the

trial court was raised for the first time in the appellant's opening brief filed by petitioner in the Court of Appeal. The Court of Appeal addressed that issue on its merits in its written opinion (Appendix A) and resolved the issue adverse to petitioner. The issue of ineffective assistance of counsel was then addressed in a petition for rehearing filed by petitioner in the Court of Appeal, and in a petition for review filed by petitioner in the Supreme Court of California; both of those petitions were summarily denied (Appendices B and C).

B. The Pertinent Facts:

The facts underlying petitioner's robbery conviction are adequately detailed in the written opinion of the Court of Appeal (Appendix A). Very briefly, petitioner committed his robbery at approximately 12:50 A.M. by going into a Taco Bell restaurant in San Jose, California, with a pistol, and ultimately pointing the pistol at one of the employees

and then having the employee turn over to petitioner all of the money in a cash register; the total amount taken was a little over $100.00. Petitioner left the restaurant and was apprehended about 24 hours later.

Since the claim of ineffective assistance of counsel centers upon the failure of petitioner's trial counsel to request an appropriate instruction relating the evidence of petitioner's mental disorders to the specific intent element of the crime of robbery, the facts surrounding petitioner's mental disorders as developed at trial are set forth below in some detail (all references hereinbelow to "R.T." are to the reporter's transcript on appeal).

The whole thrust of the defense was that as a result of two mental disorders (bi-polar disorder and attention deficit disorder) petitioner, at the time of the alleged robbery, lacked the necessary specific intent involved in that offense.

As a child, petitioner was very

hyperactive. Petitioner needed a tutor until the fifth grade and thereafter was in special education classes until high school. (R.T. 183-186.) Petitioner started using marijuana and alcohol when he was seven years old. (R.T. 311.) Petitioner ultimately started using cocaine and alcohol together in order to make himself feel normal. (R.T. 312.) In high school petitioner was very irritable, nervous and hard to handle. Petitioner would either argue with his parents or have no communication with them. (R.T. 186.)

Later, after petitioner graduated from college and began working in the San Francisco Bay Area in research and development for a company called Quake Defense in 1986, petitioner worked six to seven days a week, day and night, for a period of three to four years. (R.T. 186-187, 310-311.) Eventually, in 1990, petitioner started smoking crack cocaine and became addicted to that drug. (R.T. 312.) Petitioner started to believe that

he had a contagious disease, that bugs came out of his fingernails and that lice were in his head. (R.T. 189.) By early 1992, petitioner was unkept and withdrawn; petitioner would move from motel to motel. Also, petitioner lost all of the money he had saved. (R.T. 188-189.) During that time petitioner was taken to a hospital, but only stayed 20 to 30 minutes before leaving. (R.T. 189-190.)

In February 1992, Father Anthony Kosturos, a pastor at a Greek Orthodox Church, met with petitioner on four occasions for at least two and one half hours each time. On those occasions petitioner was very agitated. (R.T. 177.) Eventually, in March 1992, Father Kosturos took petitioner to psychiatrist Lawrence Petrakis at St. Francis Hospital in San Francisco. (R.T. 178-179, 191, 404-405, 411.) At that time petitioner was psychotic. Petitioner was paranoid in that he believed certain people and elements in society had it out for him. Petitioner was

"very high" believing that he had unusual abilities and unusual powers and that usual rules did not apply to him. Additionally, petitioner's mood was out of control and he would fluctuate to moments of being a "little bit" depressed. (R.T. 411.)

Finally, around the middle of August 1992, petitioner placed himself into a 30 day rehabilitation program in Scotts Valley in Santa Cruz County called The Camp. A few days after commencing The Camp program, petitioner was visited by his parents. Petitioner was very irritable and angry. Petitioner told his parents to go home and that he did not want to see them or talk to them. (R.T. 191-192, 312.) Also, early in petitioner's stay at The Camp program, petitioner deliberately started bumping his head against a wall. (R.T. 313.)

Dr. Raymond Reynaud, a psychiatrist working with The Camp program, met with petitioner. Dr. Reynaud diagnosed that petitioner had a bi-polar mental disorder of extreme highs and extreme lows, was a

poly-drug substance abuser and had an attention deficit disorder which was manifested primarily by anxiety and intense apprehension, expectancy and tenseness. (R.T. 215-221.) Dr. Reynaud placed petitioner on lithium, and by September 10, 1992, petitioner was responding well to the lithium and started to feel calm. (R.T. 219, 223, 225, 227, 313-314.)

Petitioner completed The Camp program on September 21, 1992, and commenced to live at a clean and sober living environment in a residence operated by Support Systems Homes at 1204 Castlemont in San Jose. (R.T. 226, 250-253, 316.) Also, after leaving The Camp program, petitioner was going to continue to see Dr. Reynaud. (R.T. 226, 316.)

Additionally, before petitioner left The Camp program he met a woman by the name of Sally Sutter who was a patient at a program affiliated with The Camp called Star Lodge. (R.T. 227, 318.) Petitioner fell in love with Sutter and became

obsessed with her. (R.T. 319.) However, according to Dr. Reynaud, who knew both petitioner and Sutter, it was not healthy for Sutter and petitioner to be together. (R.T. 228.) Later, petitioner transported Sutter from Star Lodge to a halfway house in Ben Lomond. Then, in October, November and December 1992, petitioner saw more of Sutter. (R.T. 318-319.)

Moreover, petitioner began to feel that he did not need to see Dr. Reynaud and that he could regulate his own use of lithium. (R.T. 316-317.) Then, about one week before the alleged robbery in this matter, Sutter left her halfway house in Ben Lomond and started living in petitioner's vehicle. Apparently, Sutter's halfway house was doing drug testing on the residents of the halfway house, and Sutter was using drugs. Additionally, Sutter at that time apparently was on probation and drug diversion. (R.T. 319.)

Petitioner started violating the rules of his own clean and sober residence by not

attending meetings and staying out with Sutter. (R.T. 320.) At one point while Sutter was living in petitioner's car, Sutter overdosed on some drugs, became hysterical and started to tear apart the inside of the car. (R.T. 320-321.) Then, on Friday, December 18, 1992, petitioner stopped taking his lithium all together in order to care for Sutter. Apparently, Sutter had gotten high on some methamphetamine, became "weird" and started to pull things out of petitioner's car. Petitioner decided he needed to stay up to take care of Sutter and by not taking his lithium he could stay awake and not fall asleep. (R.T. 322.)

On Saturday, December 19, 1992, petitioner had had no sleep and still was not taking his lithium. Petitioner and Sutter went to a 49er football game at Candlestick Park. They only stayed at the football game for a short time since Sutter wanted to go to Oakland to get more pills. (R.T. 322-323.) After arriving in Oakland,

petitioner remained in his car while Sutter went somewhere for quite awhile. (R.T. 324.) When Sutter came back petitioner then drove Sutter to her parents' house in the Oakland Hills where Sutter wanted to pick up more clothes. (R.T. 324.) Sutter apparently was under the influence of some drug and while at her parents' house she ended up on the ground. Sutter's father, who was a judge, told petitioner to get rid of Sutter. Petitioner picked Sutter up and carried her back to his car. (R.T. 324, 371.)

Petitioner then spent the night in his car with Sutter in a park near the residence of Sutter's parents. Sutter was passed out and close to overdosing. (R.T. 324-325.) Petitioner did not want to take Sutter to any hospital since he knew Sutter was on probation or diversion and he did not want the authorities to find out that Sutter was back in trouble. (R.T. 325.) During the night petitioner stayed up with Sutter and looked after her; petitioner did

not sleep, and he still was not taking his lithium. (R.T. 325.)

Some time late in the morning of the next day on Sunday, December 20, 1992, petitioner and Sutter ended up in Golden Gate Park in San Francisco. Petitioner tried to talk to Sutter about getting treatment. (R.T. 325-326.) Petitioner then drove back to San Jose with Sutter, and in the afternoon he returned to his clean and sober residence at 1204 Castlemont. Petitioner parked his car around the corner from the residence and left Sutter in the car. Petitioner went into the residence and talked to Andy Lujan, the executive director of Support Systems Homes. (R.T. 250, 325-326.) According to Lujan, petitioner was not regularly attending meetings at the residence. Petitioner was not caring for himself. Petitioner was getting farther away from reality, and petitioner appeared to be "gravely disabled". Petitioner's conversations veered from one topic to

another. Petitioner would be excited and then quite depressed. Petitioner would sit, stand up and then walk in place. Lujan tried to talk to petitioner about being terminated from the residence; however, petitioner would talk about some other unrelated subject. (R.T. 256-257.) In fact, at times all petitioner would talk about was being in love with Sutter and trying to help her. (R.T. 259-260.)

Petitioner then left the residence on Castlemont and drove himself and Sutter to his parents' residence in Burlingame. Petitioner arrived at his parents' residence at about 4:00 P.M., on Sunday, December 20, 1992. The plan was for petitioner and Sutter to go out to dinner with petitioner's parents. Petitioner still was not taking his lithium. At the residence of petitioner's parents, Sutter was walking around and "fiddling" around. Petitioner was trying to "babysit" Sutter. At one point Sutter called her own father from the residence of petitioner's parents.

After that call Sutter started crying and became hysterical. Sutter was "high" on some drug. Petitioner himself was nervous, irritable, and walking around a lot. Petitioner was trying to calm Sutter down. Eventually, at about 6:00 P.M., petitioner took Sutter away from his parents' residence without going out to dinner. Before petitioner left his parents' residence, petitioner's father gave him $200.00 to buy some new tires for his car and then gave him $60.00 to take Sutter out to dinner. (R.T. 193-195, 326-327.)

Petitioner then drove Sutter back to the Oakland area. Sutter went into a friend's house by herself and stayed there for about two hours. (R.T. 331.) Petitioner next drove himself and Sutter back to the San Jose area. All during this time petitioner was using a Chevron credit card to purchase gasoline for his car. Petitioner then dropped Sutter off at a Carrow's restaurant on Hamilton in San Jose. Petitioner next drove over to his

residence on Castlemont and attended a house meeting for about one and a half hours. All during this meeting petitioner could only think about Sutter back at the restaurant. At the conclusion of the meeting petitioner left his residence and returned to the restaurant where he had left Sutter. (R.T. 330-333.)

When petitioner entered the restaurant Sutter was "high" on some drug. Sutter was wearing a mini-skirt, had lipstick smeared on her, was upset at petitioner and had her "stuff" spread out on a counter in the restaurant. Men were trying to pick Sutter up. Petitioner got Sutter out of the restaurant and into his car before the police could be called. Once in petitioner's car Sutter told petitioner that she wanted to go San Francisco to be a stripper or a hooker. (R.T. 332-333.)

Petitioner then started to drive toward San Francisco on Highway 280. Anger was building up inside of petitioner, and he wanted to blow up. Petitioner then lost

control of himself, skidded across four lanes of the highway, stopped, jumped out of his car and broke off a mirror on the side of the car. At that point petitioner was yelling, and Sutter was unconscious. (R.T. 333.)

Petitioner still was not taking his lithium. (R.T. 333.) Petitioner then drove back toward his residence on Castlemont. As petitioner neared the residence, he parked his car, got out, went to the trunk of the car, got out a pistol that he used for target practice, put on some tennis shoes and walked up the street angry, mad and out of control. (R.T. 252-254, 329-330, 333-334, 382-383, 389, 504-509.) Petitioner had no intention to do anything; he was out of control and had no way of controlling himself. (R.T. 334, 382-383, 389.) Petitioner went into the Taco Bell, pulled out his gun, took maybe $100.00 and then ran out of the restaurant. (R.T. 334.) At the time of the taking of the money, petitioner was out of control,

had no idea who he was, felt like he was in a video, had no purpose, had no control and just was acting on impulse. (R.T. 358, 372-373, 376-377.)

After petitioner left the restaurant he attempted to put the pistol into his pants. However, the pistol discharged accidentally. Petitioner then got into his car, dropped the money on the floor of the car, drove down the street, stopped and hid the pistol in some bushes. (R.T. 334.) At that point petitioner felt scared. (R.T. 334.)

Petitioner then drove himself and Sutter to a motel for which he may have paid for earlier. (R.T. 334-335.) In any event, petitioner stayed at the motel for only a few moments before he drove himself and Sutter back to the Oakland area. At that point Sutter was still unconscious. (R.T. 335.) After arriving in the Oakland area petitioner and Sutter spent the night in the car in a "bad" area. Petitioner did not use or purchase any type of drug.

(R.T. 312, 335-336.)

When sunlight came Sutter wanted to go to a place called Solidarity in San Mateo. Petitioner drove Sutter to that location and waited for Sutter in the car. (R.T. 336.) As petitioner was waiting for Sutter to return he remembered that he had a 1:00 P.M. appointment with Dr. Petrakis in San Francisco. Petitioner then took some of his lithium. When Sutter returned petitioner then drove to San Francisco for his appointment with Dr. Petrakis. (R.T. 336-337.)

Dr. Petrakis saw petitioner for about half an hour commencing at 1:00 P.M. on December 21, 1992. At that time petitioner was very psychotic. (R.T. 412.) Petitioner was very agitated; petitioner's moods were up and down; petitioner did not make sense; Dr. Petrakis could not follow what petitioner was saying. (R.T. 413.) Petitioner was too disorganized to give a proper history. (R.T. 415.) Dr. Petrakis felt that petitioner needed to be

hospitalized. However, Dr. Petrakis was not willing to hospitalize petitioner in San Francisco since petitioner was living in San Jose. (R.T. 415.)

When petitioner heard that Dr. Petrakis thought that petitioner needed to be hospitalized, petitioner got scared, left Dr. Petrakis' office and drove back to San Jose. Petitioner returned to the residence at 1204 Castlemont, took a shower and started to take more of his lithium. Petitioner talked to one of the counselors at the residence, skipped a meeting and proceeded to leave the residence. Apparently, as petitioner was leaving the residence he was told that he had to be back within 40 minutes or he would be terminated from the residence. (R.T. 337-338.) Petitioner then apparently drove around with Sutter and was trying to figure out how to get rid of her. Petitioner had just left from a Chevron gasoline station when he was stopped and arrested by the police. (R.T. 338-339.)

After petitioner's arrest, petitioner in January 1993, commenced to see psychiatrist Robert Landeen and continued to see Dr. Landeen on a regular basis up to and including the time of petitioner's trial in April 1994. All during this time petitioner was seeing Dr. Landeen twice a week. (R.T. 272-273, 275, 317-318.) Dr. Landeen diagnosed petitioner as having a bi-polar (i.e., manic-depressive) mental disorder and an attention deficit disorder. (R.T. 275-278.) According to Dr. Landeen few people have both a bi-polar disorder and an attention deficit disorder. Additionally, according to Dr. Landeen the attention deficit disorder exacerbates the bi-polar disorder. (R.T. 280-281.)

As part of his treatment Dr. Landeen ultimately got petitioner on lithium to control the bi-polar disorder and on busbar to control the attention deficit disorder. (R.T. 275, 318.)

Dr. Reynaud was of the opinion that a person who had an uncontrolled bi-polar

episode would have poor judgment, be out of control, have impulsive or scattered behavior and have psychotic reasoning. In turn, this would affect one's ability to form intent. (R.T. 229-231.) Similarly, Dr. Petrakis believed that such a psychosis would very seriously impair one's ability to have intent. (R.T. 416.)

Furthermore, Dr. Landeen was of the opinion that the failure of one to take proper medication for a bi-polar disorder and an attention deficit disorder would affect one's ability to form intent. (R.T. 287-288.)

Lastly, Dr. Harvey Dondershine, a psychiatrist, explained that when a bi-polar disorder and an attention deficit disorder overlap they compound each other, create a low frustration tolerance and cause problems with regard to resisting impulses. As such one has lower ability to resist bouts of anger and will have sudden disruption of thinking and behavior leading one to snap or act out. (R.T. 446-448.)

Additionally, Dr. Dondershine listened to a tape recording of the statement petitioner gave to the police after his arrest, and the doctor pointed out that various statements and events occurring during that interview indicated that at that time petitioner was suffering from a bi-polar disorder and an attention deficit disorder that was not being properly medicated. (R.T. 449-458.) Also, Dr. Dondershine explained that someone, who felt during an incident as though he were observing his own behavior, could have impairment with regard to intent. (R.T. 460-461.)

REASONS FOR GRANTING THE PETITION

It is petitioner's contention that his trial counsel was constitutionally ineffective in failing to request a jury instruction relating petitioner's mental disorders to the specific intent required for robbery.

This Court in the past has addressed issues of ineffective assistance of counsel

for allegedly failing to conduct a proper investigation of a case (Strickland v. Washington (1984) 466 U.S. 668 [80 L.Ed.2d 674]), and for failing to raise a proper objection to the inadmissibility of certain critical evidence (Kimmelman v. Morrison (1986) 477 U.S. 365 [91 L.Ed.2d 305]).

This case appears to present a new issue to this Court, but unfortunately a reoccurring one that is frequently seen by lower appellate courts and trial courts, where a defendant's trial counsel fails to request an appropriate jury instruction that is critical and relevant to the defense presented in a case.

In this case it is obvious that the evidence of petitioner's mental disorders were directly related to the one and only material issue in petitioner's case (i.e., intent) and was introduced to show that petitioner did not have the necessary specific intent required in the offense of robbery. Petitioner repeatedly testified that he did not have an intent.

Furthermore, four psychiatrists were called as defense witnesses to support the contention that as a result of petitioner's mental disorders, petitioner did not have the necessary specific intent. The only argument to the jury by petitioner's trial counsel was that the evidence produced at trial concerning petitioner's mental disorders showed that petitioner did not have the necessary specific intent for the crime of robbery. (R.T. 573, 575, 585-586.)

However, petitioner's trial counsel never requested any type of jury instruction relating petitioner's mental disorders to the specific intent involved in the offense of robbery; nor was any such instruction given to the jury. (R.T. 546-548.) For example, an appropriate instruction would have read as follows: "In the crime of robbery of which the defendant is accused, a necessary element is the existence in the mind of the defendant of the specific intent

permanently to deprive the person of the property. If the evidence shows that the defendant had a mental disorder, or mental disorders, at the time of the alleged crime, you should consider that fact in determining whether the defendant had such specific intent. If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent, you must find that he did not have such specific intent." (See Cal. Jury Instruction-Criminal (5th ed. 1996 Supp.) No. 3.32 on p. 60, and No. 4.21 on p. 72.) Under California law such a "pinpoint" instruction was appropriate in this case if requested by trial counsel. (See People v. Saille (1991) 54 Cal.3d 1103, 1117-1121; People v. Whitler (1985) 171 Cal.App.3d 337, 343 [concurring opinion of Justice Sims]; see also People v. Morales (1992) 5 Cal.App.4th 917, 927.)

Furthermore, due to the fact that the evidence of petitioner's mental disorders was the foundation for petitioner's sole

defense in this case, trial counsel could not have had any viable tactical reason to refrain from requesting a "pinpoint" instruction clearly explaining the relationship between the evidence of petitioner's mental disorders to the specific intent required for robbery.

As this Court explained in Strickland v. Washington, supra, 466 U.S. 668, 686 [80 L.Ed.2d 674] "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Additionally, as this Court explained in Strickland, the standard for accessing an attorney's performance is whether the attorney rendered "reasonably effective assistance." (Supra, 466 U.S. 668, 687 [80 L.Ed.2d 674].)

As the California Supreme Court has said, the right to effective assistance of counsel includes the expectation that

counsel "will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (People v. Ledesma (1987) 43 Cal.3d 171, 215.) In particular, "the duty of counsel to a criminal defendant includes careful preparation of and request for all instructions which in [counsel's] judgment are necessary to explain all of the legal theories upon which [the] defense rests." (People v. Sedeno (1974) 10 Cal.3d 703, 717, fn. 7.) This clearly did not occur in this case.

The only remaining question is whether petitioner was prejudiced by trial counsel's omission. (See Strickland v. Washington, supra, 466 U.S. 668, 691-692 [80 L.Ed.2d 674].) In this case, the jury never received any instruction from the trial court relating the evidence of petitioner's mental disorders to the specific intent required of robbery. Additionally, the trial court specifically told the jury that if there were any

conflict between what counsel argued and the court's instructions, the jury was to be governed by the instructions. (R.T. 549.) The trial court also advised the jury that all of the applicable law was provided to it in the court's instructions. (R.T. 610.) Under such circumstances, contrary to the suggestion of the Court of Appeal in this case, it is unreasonable to think that the jury, on its own, somehow understood that the evidence of petitioner's mental disorders could create a reasonable doubt as to the existence of the necessary specific intent. It should not be assumed that the jury understood a legal principle never explained to it in the court's instructions. The ultimate purpose of the right to effective assistance of counsel as this Court explained in Strickland is to protect a defendant's fundamental right to a trial that can be relied on as having produced a just results.

Petitioner presented significant

evidence of the existence of mental disorders. Petitioner also presented evidence of a lay witness that in the days before the robbery petitioner was getting further away from reality, petitioner was "gravely disabled" and petitioner was regressing in his behavior. (R.T. 255-259.) Additionally, petitioner presented his own testimony that at the time of the robbery he was out of control and did not have an intent. Furthermore, petitioner presented evidence of a psychiatrist who saw petitioner about 12 hours after the robbery at which time the psychiatrist believed that petitioner was very psychotic, disorganized and needed to be hospitalized. (R.T. 412, 415.) On this record, there is a reasonably probability that a properly instructed jury could have concluded that the evidence of petitioner's mental disorders created a reasonable doubt as to whether petitioner entertained the necessary specific intent. (See Strickland v. Washington, supra, 466 U.S. 668, 694-695

[80 L.Ed.2d 674].) Consequently, the omission by trial counsel concerning the instruction in question renders the result of petitioner's trial unreliable. Thus, petitioner's conviction must be reversed because of trial counsel's ineffectiveness.

CONCLUSION

The petition for writ certiorari should be granted.

Respectfully submitted,

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NOT TO BE PUBLISHED

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FILED
Dec 13 1995
Court of Appeal
Sixth App. Dist.

THE PEOPLE,

Plaintiff and Respondent,

v.

NICK JAMES BOVIS,

Defendant and Appellant.

H012794
(Santa Clara County Super.Ct. No._165146

Defendant Nick James Bovis was convicted by a jury of second degree robbery with personal use of a firearm (Pen. Code, Sec. 211; 12022.5, subd. (a)), and was sentenced to five years in state prison. From that conviction, defendant appeals, contending (1) the trial court prejudicially erred in instructing the jury that adverse inferences could be drawn from defendant's failure to

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(All footnotes to this opinion appear at the end of the opinion.)

explain or deny evidence; (2) his counsel was ineffective for failing to request a jury instruction relating defendant's mental disorders to the specific intent required for robbery; (3) the prosecutor committed misconduct during closing argument; and (4) the trial court erred in failing to consider and rule upon his cruel and unusual punishment argument. We shall affirm the judgment.

FACTS

Shortly before 1 a.m. on December 21, 1992, defendant entereda Taco Bell restaurant located at 1298 South Winchester in San Jose. He looked around, then walked up to the counter where the manager, Ayman Salaymeh, was standing. The only other person in the restaurant was an employee named Luis. Defendant pulled out a revolver, pointed it at Salaymeh, and said, "Give me the money." Holding the gun to Salaymeh's head, defendant walked around to the back side of the counter.

Salaymeh explained that he needed a key to open the cash register. As Luis, who was about five feet away, reached for the key, defendant began shouting, "Give me the money, now." He was shaking a little as he moved the gun back and forth between Salaymeh and Luis.

Salaymeh opened the cash register and gave defendant the money inside. It was only a little over $100, so defendant ordered Salaymeh to open another cash register. However, that cash register contained no money. Defendant did not say anything, but he looked disappointed. At that point he ran out of the restaurant. Three or four seconds after he left, Salaymeh heard a gunshot. He immediately notified authorities.

At 2:45 a.m. the following day, Deputy Sheriff Timothy Shannon saw a car matching the description of the get-away car (a white, older, 4-door Mercedes) pulling out of a Taco Bell parking lot at Camden and Olympia Avenues. The male driver,

defendant, matched the description of the robber. There was also a female passenger. Shannon followed the car for about half a mile, and then pulled it over because one of the taillights was burned out. In the meantime, he had called the San Jose Police Department, which was investigating the robbery, to advise that he had found someone matching the robber's description.

Shortly thereafter, Sergeant Spence arrived. He had interviewed Salaymeh the night before, and he agreed that both defendant and the car matched Salaymeh's description. Spence pulled out his gun and ordered defendant and his passenger to get out of the car. The passenger, Sally Sutter, was hysterical and was clearly under the influence of drugs. Defendant, on the other hand, was calm. Spence handcuffed both of them and asked for permission to search the car, which was granted. There were a lot of clothes, especially women's clothes, in the car, suggesting someone was living in it. There

was also a gun case in the trunk containing 12 rounds of ammunition and a pair of ear plugs. However, no gun was found. Police also retrieved various gas station receipts and a Motel 6 receipt. In the meantime, Salaymeh arrived at the scene and identified defendant "a hundred percent."

When police pulled a certain shirt out of the car, defendant said the "jig" was up; he said he "did it," that Sally Sutter was not involved, and that he would show police where he had hidden the gun. He was then arrested and transported to the police station.

At the station, defendant was interviewed. A tape recording of the interview was later admitted into evidence. On the tape, defendant said he intended to buy drugs with the robbery money, but that "a hundred dollars was not enough . . . to get started partying." He said he had committed the robbery out of anger and acknowledged that he fact he had not taken lithium was "no excuse." He said he had

made sure not to touch anything when he was in the Taco Bell so as not to leave fingerprints, and that he had used the money from the robbery to buy gasoline, a motel room, cigarettes, soda pop, and junk food. The gun went off accidentally as he was leaving the restaurant, and he hid it in some bushes not far away. He was calm and coherent and did not seem mentally disordered, suicidal, or in need of hospitalization. Also, his blood sample did not show the presence of cocaine, methamphetamine, PCP or opiates.

After the interview, defendant assisted police in locating the gun where he had placed it in the bushes about a mile from the Taco Bell. The gun had one live bullet and one expended cartridge in it. Defendant remained cooperative throughout the search.

Defense Case

A required element of the crime of robbery is specific intent. Defendant's sole defense at trial was that he lacked

the requisite specific intent to commit the crime because, at the time of the offense, he was suffering from attention deficit disorder and bipolar disorder. Defendant, his father, his family priest, and three psychiatrist all testified in support of this theory.

Defendant was very hyperactive as a child. He had difficulty concentrating and, as a result, did not do well in school. He needed tutoring until fifth grade and was subsequently placed in special education classes. When he was seven years old, defendant started using marijuana and alcohol. He was suspended from school on various occasions for drug possession. As he got older, defendant switched to cocaine and alcohol, which he took together to make him feel normal.

He attended San Mateo Junior College and then Cal Poly San Luis Obispo. After graduating from college, defendant went to work in 1986 for a company called "Quake Defense." He worked six or seven days a

week for three or four years, never taking any time off. In 1990, however, defendant started using crack cocaine. He became addicted to it. As a result, he became very irritable and began to imagine that bugs were coming out of his fingernails and that lice were in his head.

By early 1992, defendant's appearance began to change. He looked like a street person; he was dirty and his hair was unkempt. He began withdrawing large sums of money out of his bank accounts and would move from one motel to another. Soon, all the money he had saved was lost. At one point, defendant was taken to a hospital, but he stayed for only 20 or 30 minutes.

In February 1992, defendant saw his family's Greek Orthodox priest, Father Anthony Kosturos. After four sessions with defendant, Father Kosturos decided to take him to Dr. Lawrence Petrakis, a psychiatrist at St. Francis Hospital in San Francisco.

Dr. Petrakis believed defendant was

psychotic. He was "very high" at the time of the appointment, and was convinced he had extraordinary powers and that usual rules did not apply to him. He was also quite paranoid. Defendant's mood fluctuated from "very high" to a "little bit" depressed. Dr. Petrakis acknowledged that he could not rule out the possibility that defendant's symptoms were the result of a history of drug use.

In August 1992, defendant placed himself in a 30-day rehabilitation program called the Camp in Scotts Valley. There he saw Dr. Raymond Reynaud. Dr. Reynaud diagnosed defendant as having bipolar disorder of extreme highs and lows and attention deficit disorder. He also noted that defendant was a poly-drug substance abuser. Dr. Reynaud placed defendant on lithium. By September 1992, defendant was starting to feel calm, and he appeared to be doing very well. At about this time, defendant met Sally Sutter, a patient at a facility affiliated with The Camp. Dr.

Reynaud did not feel defendant's relationship with Sutter was healthy.

On September 21, 1992, defendant finished The Camp program and went to live at a "clean and sober" residence operated by Support System Homes in San Jose. He continued seeing Dr. Reynaud for a while, then felt it unnecessary because he could regulate his own use of lithium.

In December 1992, about a week before the robbery, Sally Sutter moved out of her halfway house and into defendant's vehicle. The halfway house was conducting drug testing, and Sutter, who was using drugs, was afraid she would get caught. She was at that time on probation and on drug diversion. Meanwhile, defendant stopped attending meetings at his clean and sober residence so he could spend more time with Sutter. Around December 18, Sutter overdosed on methamphetamines. Defendant felt he had to take care of her, so he did not take his lithium that day. He needed to stay awake to take care of her, and the

lithium might make him fall asleep.

The next day, defendant and Sutter went to a 49ers football game. From there, they went to Oakland to get some pills. After that, they went to Sutter's parents' house. Sutter's father, a superior court judge, told defendant he should get rid of her. At that point, defendant took Sutter back to his car. She passed out shortly thereafter. Defendant decided not to take his lithium again that day so he could stay up all night taking care of Sutter.

The next day, December 20, defendant returned to his clean and sober residence, leaving Sutter in the car. There he talked to Andy Lujan, executive director of the residence. Lujan told defendant he might be terminated from the residence for failing to regularly attend meetings and to care for himself. Defendant kept changing the subject and seemed to be getting farther and farther away from reality.

Later that day, defendant and Sutter drove to defendant's parents' house in

Burlingame. He was hoping his parents would take them out to dinner. However, Sutter was high on some drug. After she talked to her own father on the telephone, she became hysterical and was crying. As a result, defendant and Sutter left about 6 p.m, without having gone out to dinner. His father gave him $60 for dinner, however, as well as another $200 to get tires.

From there, defendant drove to Oakland, where he waited two hours for Sutter while she met with a friend, and then back to San Jose. He dropped Sutter off at a restaurant and went to his clean and sober residence to attend a meeting. During the meeting, all defendant could think of was Sutter and how much he loved her. As soon as the meeting was over, he went to the restaurant to pick her up. There he found her high on some drug with her "stuff" spread out on the counter in front of her. Men were trying to pick her up. Defendant took her out to his car

before police could be called. In the car Sutter told defendant she wanted to go to San Francisco to be a stripper or a hooker. He started driving to San Francisco but was so angry he lost control and skidded across four lanes of highway. He stopped, jumped out of his car and broke off the mirror on the side of the car. Sutter was unconscious at the time.

Defendant then drove back toward his clean and sober residence. Before he arrived there, however, he stopped, got out of the car, went to the trunk and pulled out the gun. He had no intention to do anything. He was just mad and out of control. He put on some tennis shoes and walked down the street, went into a Taco Bell, and there pulled out his gun and took about a hundred dollars. He had not taken his lithium for over two days and he felt totally out of control, as if he were in a video. As he was leaving the restaurant, the gun accidentally went off. He got into his car, dropped the money on the floor,

and stopped and hid the gun in some bushes.

After he left the restaurant, he went with Sutter to a motel. However, they stayed only a few minutes, leaving shortly thereafter to drive to Oakland. Sutter was still unconscious. The two of them spent the night in the car in a "bad" area of Oakland.

In the morning, Sutter asked to be taken to a place called Solidarity in San Mateo. He took her there and while he was waiting remembered that he had a 1 p.m. appointment with Dr. Petrakis in San Francisco. In anticipation of the appointment, defendant took his lithium.

At the appointment, defendant appeared to be very agitated, with extreme mood swings, and not making any sense. Dr. Petrakis felt defendant was psychotic and needed hospitalization. However, when defendant heard the psychiatrist talk about hospitalization, he left the appointment and drove back to San Jose. He went to his clean and sober residence, showered, and

took more lithium. There he talked to a counselor who told him that if he missed any more meetings, he would have to leave the residence. Defendant then drove around with Sutter. Just after he left a Chevron station, he was stopped and arrested.

In the next year and four months until his trial, 1/ defendant saw psychiatrist Dr. Robert Landeen two times every week. Landeen was of the opinion that defendant had bipolar disorder and attention deficit disorder. He based this diagnosis in part on what defendant told him Dr. Reynaud had found. Dr. Landeen had never before come across any one who suffered from both attention deficit disorder and bipolar disorder. Defendant was the first. Dr. Landeen prescribed lithium for the bipolar disorder and busbar for the attention deficit disorder. Dr. Landeen noted it is difficult to diagnose bipolar disorder in a person who is a chronic drug user and who reports "almost exclusively manic behavior" and almost no depressive behavior. The

doctor must rely on the patient's past history. Short-term elation is more consistent with drug use, while elation lasting many days is more consistent with bipolar disorder.

Dr. Landeen believed that if an individual who had bipolar disorder and attention deficit disorder failed to take his or her medicine, it would affect the individual's ability to form an intent. Drs. Petrakis and Reynaud expressed similar views. Psychiatrist Dr. Harvey Dondershine is an expert in diagnosis and treatment of bipolar and attention deficit disorders. Although he did not treat defendant, he was able to form an opinion based on defendant's medical records and his taped interview with police. He felt that defendant's statements to police and his actions during the interview indicated he was suffering from both bipolar disorder and attention deficit disorder. When the two disorders are present together, Dr. Dondershine explained, they compound each

other, creating a low frustration tolerance level. He opined that a person who felt he was observing his own behavior from the outside could be impaired with regard to intent. Dr. Dondershine admitted that he was deferring in part to Dr. Reynaud's diagnosis of bipolar disorder, and that there were other potential causes, for example "a medication, street drug abuse, brain tumor, hyperthyroidism, [or] some other disease that could produce the same behavior."

Rebuttal

Sergeant Spence, who arrested defendant, and Officer Wilson, who conducted the taped interview with him, testified that they did not see any signs of mental impairment during defendant's interview or booking. He was calm and his mental condition seemed normal.

Dr. Lee Coleman testified as a expert psychiatrist in the diagnosis of bipolar and attention deficit disorders. After studying defendant's medical reports and

the taped interview, Dr. Coleman found nothing that would indicate a mental disorder, "no evidence of any loss of touch with reality. That is, he knows what's going on around him. He's not having any what we call delusions or evidence that he is not aware of the surroundings, or that he's irrational in any way." Further, defendant's speech pattern was "not typical of manic speech."

Dr. Coleman opined that there was nothing about mania that would prevent a person from forming intent. He said he disagreed with Dr. Landeen's diagnosis of attention deficit disorder: "It's preposterous. It's not a diagnosis you use in adults." He had never seen attention deficit order in the same person who had bipolar disorder. He stated that even if an individual suffered from both disorders, however, it would only affect mental condition in the broadest sense. Having the disorders was "irrelevant" to the ability to form an intent, just like

having cancer or athlete's foot would be irrelevant. Dr. Coleman reiterated that he found no evidence of psychosis, delusions or compulsions on the tape.

DISCUSSION

A. CALJIC 2.62

Defendant contends the trial court erred in instructing the jury pursuant to CALJIC No. 2.62 that it could draw adverse inferences against him from his failure to explain or deny incriminatory evidence. 2/ He contends that he adequately explained all evidence that was within the scope of his knowledge. Under those circumstances, defendant argues, it was error to give the instruction. (People v. Saddler (1979) 24 Cal.3d 671, 682-683.)

It is for the trial court to determine in the first instance whether there is evidence warranting the giving of CALJIC No. 2.62 (People v. Saddler, supra, 24 Cal.3d at pp. 681-682.) Here, the trial court explained its reasons for giving the instruction, as follows: "A lot of stuff

deals with his defense, but there's some other things that do not. Like page 11, he was asked how he handled the money in a certain way. [Par.] 'Not know why' I did it. [Par.] In fact, he uses the words 'to touch it like this so I won't get any fingerprints like this.' [Par.] My notes indicate that in reference to that, why he touched it in a certain way, he indicated: I did not know why I did it. Then I went out the door intending not to touch anything. [Par.] Then the answer was: Not know why. [Par.] So I think that throughout here there are situations, not know why I said it, not know why I did it, can't explain it -- this is page 20, line 4 through 26 -- the question was did you buy any dope. Answer: That's what I was going to do and I -- she talked me out of it. And then on examination the question: Can't explain it. Not know what I meant. [Par.] So I believe that this instruction then is appropriate under all of the circumstances here. The jury can determine

whether or not that applies to a certain answer that the defendant gave. [Par.] So then I will give CALJIC 2.62."

Defendant contends the court erred in giving CALJIC No. 2.62 because he did not fail to explain all facts within his particular knowledge: "With regard to how defendant touched or did not touch things inside the Taco Bell, defendant explained that was [sic] 'out of control' and in essence did not remember what he was doing. With regard to the contradiction as to the purpose of the stolen money, defendant explained that during the police interview, among other things, his mind was not altogether, he was totally confused and he did not know what he was talking about. Accordingly, since defendant explained all facts within his particular knowledge, it was error for the trial court to give CALJIC 2.62."

If a criminal defendant "fully accounts for his [behavior], the mere fact that defendant's story is contradicted by

other prosecution evidence does not pave the way for giving the instruction, because contradiction is not by itself a failure to explain or deny." (People v. Mask (1986) 188 Cal.App.3d 450, 455; see also People v. Saddler, supra, 24 Cal.3d 671, 681-683.) However, "'[i]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations].' [Citation.]" (People v. Belmontes (1988) 45 Cal.3d 744, 784; contra, People v. Kondor (1988) 200 Cal.App.3d 52, 57.)

Here, defendant's testimony he was so "out of control" that he did not know what he was doing is not merely a contradiction; it is arguably bizarre and implausible in the context of the other prosecution evidence that was presented. At the time of his arrest, at booking, during the

police interview and during the subsequent search for the gun, defendant was calm, articulate, and cooperative. He confessed to very deliberate behavior, totally inconsistent with one "out of control," such as being careful not to leave fingerprints at the scene of the robbery. He also explained, without hesitation, what he intended to do with the money from the robbery (i.e., buy drugs). Furthermore, the interview was taken just 26 hours after the robbery whereas defendant's trial testimony was given some 16 months later. Defendant's in-court testimony that he was out of control and did not know what he was doing when he was arrested and interviewed did not explain why he seemed so in control and so sure of what he was doing and why he was doing it at the time of the interview. Under these circumstances, "'the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury . . . .'

[Citation.]" (People v. Belmontes, supra, 45 Cal.3d at p. 784.)

In any event, even if we were to accept defendant's argument that there was no evidence he failed to explain or deny, there is still no reasonable probability of a different outcome. As the court noted in People v. Saddler, "[T]he jurors were instructed in accord with CALJIC No. 17.31 that they were to 'disregard any instruction which applies to a state of facts which you determine does not exist.' While such an instruction does not render an otherwise improper instruction proper, it may be considered in assessing the prejudicial effect of an improper instruction." (24 Cal.3d at p. 684.) In the instant case, if the jury decided defendant's explanation was not implausible, or did not constitute a failure to explain or deny, it simply would have disregarded the instruction. (Accord, People v. Saddler, supra, 24 Cal.3d at pp. 682-683; People v. Kondor, supra, 200

Cal.App.3d at pp. 57-58; People v. Peters (1982) 128 Cal.App.3d 75, 87.)

B. Ineffective Assistance of Counsel

Defendant contends his trial counsel was constitutionally ineffective in failing to request a "pinpoint" jury instruction relating defendant's mental disorders to the specific intent required for robbery.

Defendant concedes that the defense of diminished capacity was effectively eliminated by the Legislature in 1981 when it enacted Penal Code section 28. 3/ That section provides: "As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing." (§ 28, subd. (b).) Section 28 states that evidence of mental disease, defect or disorder "shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice

aforethought . . . ." Such evidence is admissible, however, on whether the defendant actually formed the necessary mental state when a specific intent crime is charged. (§ 28, subd. (a).)

"A provision abolishing the defense of diminished capacity was also included in the initiative measure adopted in June 1982 and known as Proposition 8. Section 25 was added to the Penal Code as part of Proposition 8. Subdivision (a) of section 25 provides: 'The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.' [Par.] Although there was initially some confusion about the interaction between

section 25, subdivision (a) and section 28 [citation], courts and commentators now appear to agree that the two sections are complementary and that both statutes remain operative. [Citations.]" (People v. Saille (1991) 54 Cal.3d 1103, 1112.)

Thus, while the existence of a mental disorder can no longer be proffered as a defense to a crime, it may be proffered to show that the defendant did not have the necessary mental state to commit a specific intent crime. Defendant contends on appeal that since his entire defense was based on his lack of the requisite specific intent due to his mental disorders, that defense counsel's failure to request a "pinpoint" instruction on this point constituted ineffective assistance of counsel. 4/

To establish a claim of ineffective assistance of counsel, a criminal "defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing

professional norms; and (2) counsel's deficient representation subjected the defense to prejudice, i.e., there [was] a reasonable probability that but for counsel's failings the result would have been more favorable. [Citations.]" (People v. Babbit (1988) 45 Cal.3d 660, 707.)

"'When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" [citation], the contention must be rejected.' [Citation.] A reviewing court will not second-guess trial counsel's reasonable tactical decisions. [Citation.]" (People v. Kelly (1992) 1 Cal.4th 495, 520.)

The record in this case strongly suggests a reasonable explanation for counsel's failure to request a pinpoint instruction. Most of the expert psychiatric testimony focused on whether individuals suffering from both attention deficit disorder and bipolar disorder could, in the abstract, form specific intent to commit a crime such as robbery. In fact, only defendant's testimony went to whether he actually formed the requisite intent. However, as noted above, the defense of diminished capacity is abolished in the State of California. An instruction drawing the jury's attention to the distinction between the capacity to form a specific intent and actually forming the requisite intent may have limited the jury's consideration of the psychiatric evidence.

In any event, even if this court believed that counsel <u>should have</u> requested a pinpoint instruction, it is not reasonably probable that a more favorable

determination would have resulted absent counsel's alleged error. (People v. Wharton (1991) 53 cal.3d 522, 575-576.) The defense case consisted entirely of evidence introduced to show that defendant lacked specific intent at the time of the robbery. Toward this end, defendant produced voluminous evidence that he was disoriented due to the combined effect of his two mental disorders. There could have been no possible reason for the jury to have heard all this evidence other than as it related to whether defendant had the requisite specific intent. He was positively identified by the victim; he confessed; he took police to the place where he had hidden the gun; he admitted using the gun and taking the money. In short, all the elements of the crime -- except intent -- were virtually admitted. As defense counsel told the jury in closing argument, "The issue is basically is there a specific intent to deprive Taco Bell. Did Nick Bovis on the time in question have

a specific intent to permanently deprive Taco Bell of that hundred dollars?" Defense counsel urged the jury to find defendant guilty of a lesser included offense, assault with a deadly weapon, which did not require specific intent. Under these circumstances, there can be no doubt that the jury focused on the precise issue defendant contends should have been the subject of a pinpoint instruction. Accordingly, there can be no prejudice.

C. Prosecutorial Misconduct

In closing argument, the prosecutor was discussing the fact that even a person suffering from a manic episode could form an intent. He continued: "[Dr. Petrakis] said he next saw the defendant the day of the incident, and that the defendant was able to form intent to go to the meeting on time; to get to his office where he had been only once before to get there on time; to get to the right office, the right building; through all the streets. He was able to form intent when he was psychotic.

That is consistent with Dr. Coleman who said even in very, very advanced stages of mania or manic depress[ion], a person can still form intent. [Par.] This is important because what the law requires only is that the person form the requisite intent at the time. And if there are explanations for that intent, that's a matter beyond the scope of what you are here to decide. That might be a mitigating factor the Judge would use in terms of his sentence. If he believes that, the Judge could send him to a hospital to get treatment rather than --" At that point, the following exchange took place: "[DEFENSE COUNSEL]: I am going to -- [Par.] THE COURT: Sustained. Punishment is not a factor. The jury must not consider it. You must not refer to it. [Par.] The jury will disregard the comment. [Par.] [PROSECUTOR]: Punishment is not a factor that you are to consider in this case. That is for the Judge to decide; and the Judge will decide it based on the

evidence. You will have to decide whether when he took the money, he intended to deprive Taco Bell of the money. That's it. When he took the money, did he intend to take the money permanently by depriving."

Defendant contends the prosecutor committed prejudicial misconduct by mentioning to the jury defendant's possible punishment and then erroneously misstating what that punishment might be. He points out that case law establishes that a prosecutor may not argue possible punishment to the jury, including the fact that a defendant could get treatment if convicted, and that statutory law requires a mandatory prison sentence for robbery with the use of a firearm. (Citing People v. Criscione (1981) 125 Cal.App.3d 275, 292; People v. Mendoza (1974) 37 Cal.App.3d 717, 727; § 1203.06, subd. (a)(1)(B).) Thus, he says, "[t]he only remaining issue is whether the prosecutorial misconduct in issue was prejudicial."

With respect to this "only remaining

issue," we are persuaded that any prosecutorial misconduct was not prejudicial. In this case, the trial court immediately intervened, even before defense counsel could say "objection." The court told the jury it could not consider punishment, it could not refer to it, and it must disregard the prosecutor's statement. Later, in instructing the jury, the court explained that "[s]tatements made by the attorneys during the trial are not evidence," and it admonished, "You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their argument or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions."

In People v. Criscione, supra, 125 Cal.App.3d 275, upon which defendant relies, the court held that the prosecutor committed misconduct in his cross-examination of a defense psychiatrist.

Prosecutorial misconduct occurred (1) when the prosecutor asked about a certain scientific study, which was not in evidence and upon which the psychiatrist had not relied on direct examination, that the prosecutor suggested showed that half of all mental illness is feigned; (2) when the prosecutor suggested to the jury that defendant's act of violence was merely the acting out of a common southern Italian masculine role which was the norm in the Italian-American subculture, rather that the result of mental illness; and (3) when the prosecutor implied by a series of questions directed to a defense psychiatrist that if released defendant was likely to kill again. Most of the colloquies between the prosecutor and the witness were set forth verbatim in the opinion, which consisted of numerous pages. Throughout most of the dialogue, the defense attorney remained silent, interposing no objections. In the few situations in which objections were made,

the court simply sustained them. It never issued an admonishment to the jury. The appellate court commented that "'"[f]ewer judgments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint."'" (Id. at p. 293.)

In the instant case, in contrast, the prosecutor was cut off in the middle of his sentence. The court replied "[s]ustained" before defense counsel could even get out the word "objection." The court immediately admonished the jury to disregard the comment. It reminded them that punishment was not a factor they should consider or refer to. Under these circumstances, there can be no prejudice from the prosecutor's comment in closing argument.

D. Cruel and Unusual Punishment

Defendant contends (1) the imposition of a prison sentence 5/ was cruel or unusual punishment under the facts of this case and (2) the trial court erred in

concluding it had no discretion but to impose the prison term. 6/

"It is well settled a statutory punishment may violate the constitutional prohibition against cruel and unusual punishment not only if it is inflicted by a cruel or unusual method but also if it is grossly disproportionate to the offense for which it is imposed. [Citation.] In the case of In re Lynch (1972) 8 cal.3d 410, the Supreme Court held a punishment may violate the California Constitutional prohibition 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (Id. at p. 424.)" (People v. Thompson (1994) 24 Cal.App.4th 299, 304.)"

In People v. Dillon (1983) 34 Cal.3d 441, the Supreme Court expanded on its analysis of crimes and proportional punishments. The court explained that the trial court must consider the specific

facts of the crime in question, as compared with only considering the crime in the abstract. (Id. at p. 479.) In addition, the court must consider the nature of the offender and ask whether the punishment is grossly disproportionate to the defendant's culpability, taking into account factors such as age, prior criminality, personal characteristics, and state of mind. (Ibid.)

Defendant, understandably, does not emphasize the "specific facts of the crime" in question. He did, after all, enter the Taco Bell in the middle of the night, take out a loaded gun, hold it to the head of the restaurant manager, and demand the contents of the cash register. When that cash register did not yield enough money, he demanded that a second cash register be opened. At the time, he pointed the gun back and forth between the manager and employee Luis. While he was in the restaurant, he was careful not to leave any fingerprints which might incriminate him.

His loaded gun went off as he exited the restaurant.

Rather, defendant emphasizes the "nature of the offender," reiterating in four pages the thrust of his defense case: he was hyperactive and was suffering at the time of the robbery from the effects of bipolar disorder and attention deficit disorder. Furthermore, in the two days before the robbery, he had not taken his lithium and was under great stress on account of his girlfriend. However, in spite of the psychiatric evidence, the jury concluded that defendant was able to, and did in fact, form a specific intent to commit the robbery. Thus, the issue of defendant's personal responsibility for the crime has already been litigated and decided adversely to him. 7/ Accordingly, under the facts of this case, the denial of probation did not constitute cruel or unusual punishment, whether or not the trial court believed it did not have discretion to rule on this issue.

DISPOSITION

The judgment is affirmed.

_____

Cottle, P.J.

WE CONCUR:

_____

Bamattre-Manoukian, J.

_____

Wunderlich, J.

FOOTNOTES TO OPINION

1/ Defendant has been out on bail at all times, except for three days, since his arrest, including during the pendency of this appeal.

2/ CALJIC No. 2.62 provides: "In this case defendant has testified to certain matters. [Par.] If you find that defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [Par.] The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [Par.] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence."

3/ All further statutory references are to the Penal Code unless otherwise specified.

4/ The instruction appellate counsel suggests should have been given is: "If the evidence shows that the defendant had a mental disorder, or mental disorders, at the time of the alleged crime, you should consider that fact in determining whether the defendant had such specific intent."

In fact, a CALJIC pattern instruction would have been directly on point. CALJIC No. 3.32 reads: "Evidence has been received regarding a mental disorder of the defendant at the time of the crime charged. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crime charged, to wit, robbery."

5/ The Court sentenced defendant to the lower term of two years for the robbery and an additional term of three years for personally using a firearm.

6/ Section 1203.06 provides, in pertinent part: "Notwithstanding Section 1203: [Par.] (a) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons: [Par.] (1) Any person who personally used a firearm during the commission or attempted commission of any of the following crimes: . . . . [Par.] (B) Robbery, in violation of Section 211." The Supreme Court has upheld section 1203.06 as a permissible exercise of the legislative prerogative to define crimes and prescribe punishments. (People v. Tanner (1979) 24 Cal.3d 514, 520.)

Based on section 1203.06 and the particular facts of this case, the court twice stated that a mandatory prison sentence was required. First, when after the jury reached its verdict, a juror asked about the penalty, the court said: "You have to understand that in this case, because he personally used a firearm, this is a mandatory state prison commitment. There's no alternative. I don't have any choice in this regard because the Legislature has said if you commit a robbery with a firearm handgun, it's a mandatory state prison." Second, at

sentencing, the court announced, "The court has discussed this with counsel in chambers. In this particular case this is a mandatory state prison commitment. The court has no choice, in the court's view, in this particular matter."

7/ The California Supreme Court quoted the following language from Enmund v. Florida (1982) 458 U.S. 782 for the proposition that punishment must fit the defendant's own conduct and his personal culpability: "'Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.'" (People v. Dillon, supra, 34 Cal.3d at p. 482; emphasis added by Supreme Court.)

FILED

JAN 12, 1996

Court of Appeal-Sixth App. Dist.
By _____
DEPUTY

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE	)	
	)	
Plaintiff and Respondent,	)	No. H012794
	)	
vs.	)	Superior Court
	)	No. 165146
NICK JAMES BOVIS	)	
	)	
Defendant and Appellant.	)	
	)	

BY THE COURT*

Appellant's petition for rehearing is denied.

Dated: Jan. 12, 1996

BAMATTRE-MANOUKIAN, J.
ACTING P.J.

*Before Cottle, P.J., Bamattre-Manourkian, J., and Wunderlich, J.

APPENDIX B

Supreme Court
FILED

MAR 13, 1996

Robert Wandruff Clerk

DEPUTY

Sixth Appellate District

No. S051359

IN THE SUPERIOR COURT OF CALIFORNIA

THE PEOPLE, Respondent,

v.

NICK JAMES BOVIS, Appellant.

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX C